

No 7.

THE LORDS found action *ad deliberandum* to be competent to all heirs that may be charged ; and without considering the import of the clauses, sustained process at the pursuer's instance.

Harcarse, (EXHIBITION.) No 490. p. 135.

1707. March 20.

JANET BUCHANAN, LADY LENY, and her Husband, for his interest, *against*
The MARQUIS of MONTROSE.

No 8.

An apparent heir in a process *ad deliberandum*, cannot insist to have the writs exhibited transumed.

IN the exhibition *ad deliberandum* at the instance of the Lady Leny, as apparent heir to John Buchanan of that ilk her father, against the Marquis of Montrose, the defender having exhibited certain writs, the pursuer craved to be allowed to take a transumpt upon her own charges of such of them as she had a peculiar interest in, and contained clauses in her favour.

Alleged for the defender, He was not obliged to allow transumpt of his own writs in an action *ad deliberandum*, which only tends to inspection ; for to transume is much the same with giving up the papers, and inconsistent with a *deliberandum* ; seeing intromission with writs is *ipso facto* behaviour as heir, and intromitting with transumpt thereof is equivalent ; *2do*, The pursuer cannot have transumpt without an active title as heir ; and though she were served heir, the defender could exclude her interest by a preferable right.

Answered for the pursuer, It is not only usual to pursue actions of transumpt, but the Lords have frequently allowed transumpt *incidenter* in other actions, when writs were produced that were common evidents, or wherein parties had special interest ; and the pursuer's summons *ad deliberandum* contains a conclusion for transuming such writs as she has interest in, and the act thereupon extracted bears, that transumpt of such writs should be given her upon her own charges.

THE LORDS found, That an apparent heir cannot, in a process *ad deliberandum*, insist to have the writs exhibited transumed ; and therefore refused to allow transumpt to the pursuer.

Forbes, p. 159.

1714. February 10.

DAVID CRAWFURD *against* MARGARET CRAWFURD, Sister to the deceased
ANDREW CRAWFURD of Crawfordstoun, and ANDREW CRAWFURD, now of
Crawfordstoun, her Son.

No 9.

Exhibition *ad deliberandum* is competent to all kinds of heirs, male and of tailzie,

DAVID CRAWFURD having, as apparent heir male to Andrew Crawford of Crawfordstoun, pursued an exhibition *ad deliberandum* against Margaret Crawford, and Andrew Crawford her son, and called for production of the said de-

ceased Andrew Crawford's contract of marriage with Agnes Campbell ; where-
in the pursuer alleged that the defunct had tailzied this estate to heirs male,

Alleged for the defenders, *1mo*, Action *ad deliberandum* is competent only to heirs of law who succeed *provisione legis*, and not to heirs male or of tailzie who succeed *provisione hominis*, and have not an universal, but only a special title of succession ; unless they instruct that the former investitures are conceived in favours of heirs male. For, if the pursuer's simple assertion, that there were rights in the defunct's person, to which he may succeed as heir male, be sustained to oblige the defenders to depone in this action, any stranger who hath no propinquity to the defunct, pretending a right by tailzie, may officiously infest people with an action *ad deliberandum* ; *2do*, The defenders offer to prove that there is a nearer heir male than the pursuer, and therefore no process can be sustained at his instance ; *3tio*, Though the pursuer were the true heir male, yet there is no place for this action at his instance ; because he hath already immixed himself and behaved as heir, by disposing the subject to which he could succeed, l. 19. C. *de jure deliberandi*, which subjects him to the defunct's debts equally as if he were served heir ; and he who cannot repudiate needs not to deliberate.

Answered for the pursuer, Action *ad deliberandum* is a privilege competent to every kind of heir, Stair, lib. 3. tit. 5. ; and the reason of the thing holds equally strong in favour of an heir male as of a lineal heir ; because, though the latter be liable to debts *primo loco*, yet he being discussed, the heir male and of tailzie is liable *subsidiarie et secundo loco* ; yea there may be debts wherewith the heir male and of tailzie is liable *subsidiarie et secundo loco* ; yea there may be debts wherewith the heir male or of tailzie is directly burdened without any relief from the heir of line ; *2do*, It is *jus tertii* to the defenders to object a nearer heir, seeing he doth not compear to exclude the pursuer ; *3tio*, Behaviour as heir is a passive title which none can incur but such as are *alioqui successuri* ; therefore it cannot be pleaded that the heir male hath behaved, until it appear from the exhibition that he would have succeeded to the subject he is alleged to have immixed himself with. Besides, *non relevat*, that he hath behaved as heir to exclude this process, it being only competent to creditors to found on such a passive title, Stair, lib. 4. tit. 33. ; and though he were by the behaviour *passive* liable to them, he must have the privilege of this action *ad expiscandum*, if it be convenient for him to enter heir, in order to acquire an active title to pursue for every thing tailzied to him by the defunct, and found his relief against the lineal heir of all debts wherewith the tailzied estate is not expressly burdened.

THE LORDS found, That an exhibition *ad deliberandum* is competent to all kinds of heirs, and that the pursuer's immixing doth not deprive him of his *jus deliberandi* ; but sustained the defence that there is a nearer heir male than the pursuer, to exclude process at his instance.

Fol. Dic. v. 1. p. 283. Forbes, MS. p. 25.

No 9.

as well as
heirs of line.
Gestio pro here-
de, is no bar
against an
apparent heir
pursuing ex-
hibition *ad*
deliberandum.